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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

WWIZ, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carl L. Shipley, attorney for WWIZ, Inc., petitioner herein, respectfully requests in its behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case.

OPINION DELIVERED IN THE COURT BELOW TO BE REVIEWED

The opinion delivered in the United States Court of Appeals is No. 20,398, decided January 20, 1967, and is set out infra in the appendix hereto at page 1A.

JURISDICTION

Petitioner relies upon 28 U.S. Code Section 1254 as the basis for jurisdiction of this Court, and alleges and verily believes that special and important reasons call for a grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19 exist, as set forth more particularly in the questions presented for review and arguments amplifying reasons relied on for allowance of writ hereinafter set forth.

QUESTIONS PRESENTED FOR REVIEW

1. Is it a denial of due process and equal protection of the laws of the Federal Communications Commission to frame different sets of hearing issues for similarly situated parties in non-renewal of license proceedings, limiting the issues to forfeiture of authority to operate in one case, while allowing a fine or other lesser sanctions in a parallel case?

2. Is it a denial of due process for the Federal Communications Commission to ignore the provisions of sections 1004 and 1008 of the Administrative Procedure Act which require opportunity for settlement and to achieve compliance before a license non-renewal proceeding is initiated leading to forfeiture of a broadcast authorization?

CONSTITUTIONAL PROVISION INVOLVED

Amendment 5

> ". . . No person shall be deprived of life, liberty, or property, without due process of law; . . ."

STATUTES INVOLVED

5 USC 1004(c)

> ". . . No such officer shall consult any person or party on any fact and issue unless upon notice and opportunity for all parties to participate . . ."

5 USC 1007

". . . The officer who presided . . . shall initially decide the case . . ."

STATEMENT

WWIZ, Inc. is the licensee of a standard broadcast station operating on 1380 kc, 500 w power, daytime only, at Lorain, Ohio. On March 25, 1964 the Federal Communications Commission denied WWIZ's application for renewal of license. Thereafter WWIZ exhausted such procedures and appeals as were available, the final action of which was denial of WWIZ's petition for rehearing before this Court on May 16, 1966 (384 U.S. 947). The Commission's original order (36 F.C.C. 924, adopted April 22, 1964) provided that WWIZ must cease operation and/or its authorization would terminate 60 days after judicial affirmance of the Commission's decision. On June 9, 1966, WWIZ requested the Commission to stay its above-described decision, and on July 7, 1966 the Commission adopted a memorandum opinion and order which delayed its termination order until October 13, 1966, which was subsequently again extended until 30 days after extension or permanent authority to use WWIZ's facilities is granted to a successor.

On June 9, 1966, WWIZ, Inc. filed a petition with the Federal Communications Commission requesting it to set aside the order, reopen record, and enlarge or change the issues in the proceeding which led to the Commission's original 1964 order denying its application for renewal of broadcast license. On July 28, 1966 the Commission denied said petition, and the lower court on January 20, 1967 affirmed the Commission's decision.

In said petition, WWIZ, Inc. set forth the fact that the principal instigator of the proceedings which led to denial of WWIZ's license renewal application was the Elyria-Lorain Broadcasting Company, licensee of radio station WEOL, located in Elyria, Ohio, near Lorain, and serving

the Lorain market in competition with WWIZ. The records of the Federal Communications Commission clearly indicate that for nearly a decade station WEOL has carried on a campaign to keep Lorain Journal Company, a newspaper publisher in competition with the owners of station WEOL, out of broadcast operations. The sale by WWIZ, Inc. of a minority stock interest to the Lorain Journal Company in 1958 shortly after it commenced business led to allegations by WEOL that there had been an unauthorized transfer of control, in violation of the FCC's rules, and this in turn led to the ultimate order denying WWIZ, Inc.'s application for license renewal.

In an ironic turn of events in the WEOL-Lorain Journal fracas, the Lorain Journal Company on July 27, 1964 requested the Federal Communications Commission to deny the renewal application of WEOL on grounds of an unauthorized transfer of control, and that station conceded that by December 12, 1960 over 50% of its stock had been transferred without authority to new entities upon whose qualifications the Federal Communications Commission had not passed. On September 29, 1965 the Commission designated the WEOL renewal application for hearing on issues involving an unauthorized transfer of control.

In framing issues for the hearing on WWIZ, Inc.'s license renewal application, the Commission limited the Examiner to a determination of whether or not WWIZ, Inc. possessed the requisite qualifications to be a licensee of the Commission. WWIZ, Inc.'s renewal application was designated for hearing on February 21, 1962. However, when the Commission decided to set the WEOL license application for hearing on September 29, 1965, more than 18 months after WEOL successfully brought about denial of WWIZ's license renewal application, the Commission framed issues permitting the Examiner to determine whether a forfeiture in the amount of $10,000.00 or some lesser sum should be ordered, or whether a cease and desist order should be issued against WEOL, and omitted

any issue of determining whether or not WEOL possessed the requisite qualifications to be a licensee of the Commission.

In each case the Commission took the initiative *sua sponte* in framing the issues, and did not rely upon either WWIZ or WEOL to suggest or propose issues, or establish the guidelines within which the Hearing Examiner was directed to make determinations in his Initial Decision.

In another later and unrelated case the Commission on May 12, 1966 reopened the record in WMOZ, Inc. as a result of the decision in *WMOZ, Inc. v. FCC,* 120 U.S. App. D.C. 103, 344 F.2d 197, wherein it was held that the Commission must determine whether a license renewal denial was the product of a conspiratorial competitor's effort to destroy a station and drive it out of business. This action involved a new principle not theretofore considered by the Commission or broadcast licensees. Since both the framing of issues in the WEOL hearing and the court's action WMOZ, Inc., and the Commission's subsequent reopening of the record, were events which transpired subsequent to the WWIZ, Inc. hearing, WWIZ, Inc. filed with the Commission the June 9, 1966 petition to reopen the record referred to hereinabove, so that it might receive the same treatment as WEOL and WMOZ. Its petition was denied.

REASONS FOR GRANTING THE WRIT

The Courts have generally applied to the Federal Communications Commission the Fifth Amendment requirement of procedural "due process." *WJR, The Goodwill Station,* 174 F.2d 226, rev. on other grounds, 337 U.S. 265. However, procedural due process has never been a term of fixed and invariable content, *Western Air Lines v. CAB,* 184 F.2d 933, and has been held to depend on circumstances; e.g., "arbitrary action is not due process of law," *Schachtman v. Dulles,* 225 F.2d 938. In considering procedural due process questions, courts should not be unmindful that due process by Federal administrative

agencies includes "equal protection of the laws." *FTC v. Millers National Federation*, 23 F.2d 938. Generally, "due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." *Duncan v. Missouri*, 152 U.S. 377, 382. Thus, administrative rulings that do not operate to treat similarly situated persons alike would seem to be lacking in due process.

This Court has not passed upon the precise question of how and to what extent due process and equal protection of the laws apply to the framing of hearing issues by the Federal Communications Commission. Petitioner alleges and verily believes that this constitutional protection applies to every substantial phase of the hearing process. The Commission in the instant case on its own motion framed entirely different hearing issues on the same substantial question of unauthorized transfer of control as between WWIZ and WEOL, its competitor, as set forth in the "Petition To Set Aside Order, Reopen Record, and Enlarge or Change the Issues," denial of which is the subject of this petition, as follows:

> "1. On February 21, 1962 the Commission designated the above application for license renewal for a hearing in a consolidated proceeding, upon the following pertinent issues:
>
> '1. To determine (a) whether, prior to November 12, 1958, there existed between the parties to the application for transfer of control of WWIZ, Inc., and their principals any agreement or understanding to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal Company, without the prior consent of the Commission; (b) whether there existed between the parties to said application, and their principals, at the time of the execution of the November 12, 1958 stock transfer contract, any agreement or understandint to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal, without the prior consent of the Commission; (c) whether there existed between the parties to said application, and

their principals, at the time of the transfer of 45% of the authorized common stock of WWIZ, Inc. on January 28, 1959, any agreement or understanding to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal Company without the prior consent of the Commission; (d) whether the execution and/or consummation of the November 12, 1958 stock transfer contract and/or the simultaneous purchase of 100% of the authorized preferred stock of WWIZ, Inc. by the Lorain Journal Company and/or the maintenance of certain corporate records of WWIZ, Inc. by the Lorain Journal Company and/or the election of certain directors and officers of WWIZ, Inc. on November 12, 1958 and/or certain amendments to the bylaws and code of regulations of WWIZ, Inc. and/or the exercise by the Lorain Journal Company of certain authority over the expenditures of WWIZ, Inc. were designed to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal Company without the prior consent of the Commission; (e) whether, as a result of the above actions, control of WWIZ, Inc. was transferred to the Lorain Journal Company without the prior consent of the Commission; and (f) whether the Lorain Journal Company has exercised control over WWIZ, Inc. without the prior consent of the Commission.

'2. To determine whether WWIZ, Inc. has failed to furnish the information required by the application form and/or has failed to prosecute its application (BR-3707) for renewal of license of Station WWIZ; and if so, whether said application should be dismissed pursuant to Sections 1.304 and 1.312 of the Commission's Rules.

'3. To determine whether, during the past license period of Station WWIZ, WWIZ, Inc. violated the provisions of Sections 3.93(c), 3.111 and 3.113 of the Commission's Rules.

* * *

'7. To determine whether, in light of the evidence adduced with respect to the foregoing issues, the above-captioned applicants possess the requisite qualifications to be licensees of the Commission.

'8. To determine whether, in light of the evidence adduced with respect to the foregoing issues, a grant of any of the above-captioned applications would serve the public interest, convenience or necessity.

"2. Said action by the Commission was instigated by a 'Petition to Deny' filed by Elyria-Lorain Broadcasting Company, Elyria, Ohio, licensee of WEOL and WEOL-FM, which compete for business in the Lorain market with WWIZ, Inc.

"3. As indicated in the Commission's order of February 21, 1962, WEOL charged WWIZ, its competitor, with 'an attempt to legitimize the illegal control of WWIZ, Inc. by the Journal and to secure Commission approval of a blatant attempt to traffic in a license; that the reasons stated by Schafitz for selling the balance of his stock in WWIZ, Inc. to provide additional financing and time to the operations of Station WXTV, Youngstown, Ohio are spurious; and that the above facts constitute the "in-and-out" story of a promoter of a construction permit,' which led ultimately to the Commission's order designating WWIZ, Inc.'s license renewal application for hearing on basic issues involving transfer of control.

"4. As a result of the hearing on the above cited pertinent issues, the Commission rendered a decision ordering WWIZ, Inc. to cease operations and terminating its authorization, which said order is scheduled to become effective July 15, 1966. (31 Fed. Reg. 7533, May 25, 1966).

"5. As outlined herein, the principal instigator of the hearing on WWIZ, Inc.'s application for renewal of its broadcast license was the Elyria-Lotain Broadcasting Company, licensee of radio station WEOL, located in Elyria, Ohio, near Lorain and serving the Lorain market in competition with WWIZ.

"Significantly, the only alternatives for decision under the issue as framed was a grant or denial of WWIZ's application for renewal of its broadcast license. Although the Hearing Examiner in his initial decision granted the WWIZ license renewal application, the Federal Communications Commission reversed the initial decision and denied the appli-

cation in a decision dated March 31, 1964, which was ultimately sustained by the United States Court of Appeals, whose decision in turn was the subject of the petition for writ of certiorari herein, which this Court denied on April 4, 1966. The petition for writ of certiorari was filed in this Court on February 15, 1966.

"After WEOL had successfully brought about the denial of the application for renewal of the broadcast license of its competitor in the Lorain, Ohio market, WWIZ, Inc., broadcasting station WEOL in an ironic turn of events found itself hoisted on its own petard.

"Upon the complaint of the Lorain Journal Company filed on July 27, 1964 requesting the Federal Communications Commission to deny the renewal application of WEOL on grounds of an unauthorized transfer of control (Elyria-Lorain Broadcasting Co., licensee of WEOL conceded that by December 12, 1960 over 50% of its stock had been transferred without authorization to newcomers upon whose qualifications the Federal Communications Commission had not passed, through a series of small transfers over the period from 1947 to 1960), the Federal Communications Commission on September 29, 1965 designated for hearing the WEOL application for renewal of broadcast license on issues involving an unauthorized transfer of control, which permitted the Hearing Examiner to impose several lesser penalties than outright denial of the renewal application, as contrasted with the 'sudden death' issue applied in WWIZ's renewal application hearing, as follows:

'1. To determine whether The Lorain County Printing and Publishing Company assumed control of the licensee of Stations WEOL AM & FM, Elyria, Ohio, in violation of Section 310(b) of the Communications Act of 1934, as amended.

'2. To determine, in light of the evidence adduced pursuant to the first issue listed above, whether a forfeiture in the amount of $10,000 or some lesser sum should be ordered; and whether a Cease and Desist Order should be issued.

'3. To determine, in light of the evidence adduced pursuant to the first and second issues listed

above, whether any grant of the renewal applications should be subject to the condition that The Lorain County Printing and Publishing Company divest itself of any or all its interest in the licensee.

'4. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the above-captioned applications would serve the public interest, convenience, and necessity."

"Thereafter, the Lorain Journal on October 15, 1965 filed a petition with the Federal Communications Commission to modify the Hearing Order to include not only a *de facto* transfer of control, but any *de jure* transfer of control, on grounds that the Federal Communications Commission's stated policy in *Melody Music, Inc. v. FCC*, 345 F.2d 730, 4 R.R.2d 2020, requires equal treatment of applicants charged with similar violations of the FCC's rules, i.e., unauthorized transfer of control. On February 24, 1966, the Commission denied a request that WEOL be required to produce the same documents and papers which it had required WWIZ to produce and which formed the basis for the Federal Communications Commission's ultimate decision denying WWIZ's license renewal application.

"6. The Commission itself has indicated that licensees should be given equal treatment procedurally where the offenses alleged are substantially the same. *Melody Music, Inc. v. FCC*, 345 F.2d 730, 4 R.R.2d 2029. As stated by the Commission in its February 4, 1966 order relating to the WEOL license renewal hearing, 'As far as we are able to determine, however, the possibility of a conditional grant was not raised in WWIZ.'

"Petitioner respectfully points out that at the time its license renewal application was designated for hearing on WEOL's complaint alleging unauthorized transfer of control, petitioner did not know and had no way of knowing (1) that WEOL itself had during 1960 transferred control without FCC authority and either negligently or willfully failed to seek prior FCC authority or report same, and (2) the Commission, in designating the WEOL license renewal application for hearing would frame entirely different and far more favorable issues which could

lead to a finding of a penalty of 'forfeiture in the amount of $10,000 or some lesser sum,' or 'whether a Cease and Desist Order should be issued' as sanctions, instead of the total forfeiture of license as the only alternative to renewal permitted by the WWIZ hearing issues, or would consider a conditional grant *sua sponte* for WEOL. Moreover, the Commission framed the issues in the WEOL proceeding just as it did in the WWIZ proceeding, and did not depend upon WEOL to raise the possibility of a conditional grant.

"Petitioner verily believes the Commission was arbitrary in framing issues for WWIZ which limited the hearing to renewal or denial of license renewal, on WEOL's allegations of unauthorized transfer of control, but framing issues involving a choice for lesser sanctions for WEOL, on Lorain Journal's allegations of unauthorized control. The Supreme Court has held that constitutional due process applies to administrative proceedings. *Greene v. McElroy*, 360 U.S. 474. Petitioner verily believes due process involves the framing of issues which permit the parties and Hearing Examiner to consider lesser sanctions than denial of a license renewal application for WWIZ as well as for WEOL, where economic competition has been the motive behind WEOL's efforts to destroy WWIZ, Inc.

"7. In *WMOZ, Inc. v. FCC*, 120 U.S. App. D.C. 344 F.2d 197, the U.S. Court of Appeals held that the Commission must reopen the record to determine whether a license renewal denial was the product of a conspiratorial competitor's effort to destroy a station and drive it out of business. (See Commission's Order FCC 66-417, released May 12. 1966). As provided in 47 CFR 1.229, the Commission can take official notice of the fact that WEOL has for a decade engaged in a competitive battle with Lorain Journal to keep that newspaper out of broadcast competition with WEOL, and that WWIZ, Inc. is to some extent a victim of fall-out from that titanic and perpetual combat, during which WEOL has sought to use the FCC's procedures as a sword in its arsenal to maintain its competitive monopoly as against Lorain Journal.

"8. Because of the grossly different hearing issues framed *sua sponte* by the Commission in the

> WWIZ and WEOL matters, despite the same alleged derelictions, and the failure of the Commission to include lesser sanction issues for WWIZ on its own motion, and because WWIZ could not then know the Commission would be disposed to take such action for WEOL in a similar situation, WWIZ, Inc. respectfully requests the Commission to set aside its decision in the WWIZ, Inc. proceeding (FCC 64-249, released March 31, 1964 and FCC 64-352, released April 24, 1964), frame new issues for WWIZ the same as those framed in the WEOL proceeding (FCC 65-857, released September 29, 1965, and FCC 66 R-50, released February 7, 1966), and reopen the record to allow WWIZ and other interested parties an opportunity to adduce evidence, cross-examine witnesses, and otherwise protect its substantial interests.
>
> "WHEREFORE, the premises considered, WWIZ, Inc. respectfully requests the Commission to take the actions necessary to accomplish the above outlined purposes."

Appellant urges upon the Court the fact that the Administrative Procedure Act (5 U.S.C.A. 1001, et seq.) contemplates a hearing in the fullest sense of the word. The Hearing Examiner is made independent (par. 1004(c), 1007), and is obviously limited to the issues framed by the agency. Thus, the WWIZ hearing issues did not permit evidence or argument on lesser sanctions than outright denial of WWIZ's license renewal application and consequent forfeiture of its business.

The Commission completely overlooked and ignored 5 U.S.C.A. 1004(b) which requires in terms:

> "The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment . . .".

This procedure is surely a part of due process and necessary to any full hearing. It was denied to appellant.

Similarly, 5 U.S.C.A. 1008 provides in terms that:

> "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful *unless* prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements." (emphasis supplied)

Appellant was not given any such notice or "opportunity to demonstrate or achieve compliance" in the WWIZ, Inc. license renewal proceeding, and it would appear the Commission's action is unlawful *per se* under the Administrative Procedure Act, which is another aspect of denial of due process. Certainly unlawful agency action is arbitrary by reason of that fact alone.

As stated in the *WJR* case, *supra,* "an essential element of due process is an opportunity to be heard before the reaching of a judgment" — and this would seem to include all relevant issues, and in framing issues the Commission should not only provide similar issues in similar cases, but all issues in all cases. Neither of these tests was met in the WWIZ license renewal proceeding, and the refusal of the Commission to set aside its order and change the issues was arbitrary and unconstitutional. The Commission's actions in the instant case violate "the rudimentary requirements of fair play" recognized by this Court in *Morgan v. United States,* 304 U.S. 1, as inherent in due process. Cf.: *St. Joseph Stockyards Co. v. United States,* 298 U.S. 38, 74.

The Commission's Order of July 27, 1966, denying appellant's petition to set aside its previous order, reopen the record, and change the issues reveals on its face that at the outset it prejudged appellant before hearing, and limited the scope of the issues in accordance with that prejudgment, e.g.:

"The Commission determined at the outset that the changes in the Elyria-Lorain proceeding appeared to be less serious in nature than those advanced in the WWIZ proceeding; consequently different issues were called for . . .".

Appellant submits due process contemplates a hearing by a Commission open to persuasion, not closed as a result of prejudgment, in whole or in part.

CONCLUSION

For the foregoing reason a writ of certiorari should be granted to review the judgment of the court below.

Respectfully submitted,

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APPENDIX

[Filed January 20, 1967]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,398 September Term, 1966.

WWIZ, Inc.,

Appellant

v.

Federal Communications Commission

Appellee

Appeal from Orders of the Federal Communications Commission.

Before: Fahy, Leventhal and Robinson, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the Federal Communications Commission appealed from in this case are affirmed on the basis of the memorandum opinions of the Commission released July 8 and July 28, 1966.

Per Curiam

Dated: JAN 20 1967